

1 (May 28, 1996)

2 **Disadvantaged Business Enterprise Participation (DBE)**

3 **Policy And DBE Obligation**

4 (1) *Policy* It is the policy of the U.S. Department of Transportation that
5 Disadvantaged Businesses as defined in 49 CFR part 23 shall have the
6 maximum opportunity to participate in the performance of contracts
7 financed in whole or in part with Federal funds under this agreement.
8 Consequently the Disadvantaged Business Enterprise (DBE)
9 requirements of 49 CFR part 23 apply to this agreement.

10
11 (2) *DBE Obligation* The recipient or its Contractor agrees to ensure
12 Disadvantaged owned Businesses as defined in 49 CFR part 23 have
13 the maximum opportunity to participate in the performance of contracts
14 and subcontracts financed in whole or in part with Federal funds
15 provided under this agreement. In this regard all recipients or
16 Contractors shall take all necessary and reasonable steps in accordance
17 with 49 CFR part 23 to ensure DBEs have the maximum opportunity to
18 compete for and perform contracts. Recipients and their Contractors
19 shall not discriminate on the basis of race, color, national origin, or sex in
20 the award and performance of DOT assisted contracts.

21
22 The DBE Policy Statement and DBE Obligation cited above shall be
23 made a part of all subcontracts and agreements entered into as a result
24 of this contract.

25
26 **Definitions**

27 When referred to in this contract, the terms Disadvantaged Business
28 Enterprise (DBE), will be construed to have the following meaning:

29
30 *Disadvantaged business* means a small business concern: (a) Which is at
31 least 51 percent owned by one or more socially and economically
32 disadvantaged individuals, or, in the case of any publicly owned business, at
33 least 51 percent of the stock of which is owned by one or more socially and
34 economically disadvantaged individuals; and (b) whose management and
35 daily business operations are controlled by one or more of the socially and
36 economically disadvantaged individuals who own it.

37
38 *Small business concern* means a small business as defined pursuant to
39 section 3 of the Small Business Act (15 U.S.C. 632) and relevant regulations
40 promulgated pursuant thereto (see 13 CFR part 121), except that a small
41 business concern shall not include any concern or group of concerns
42 controlled by the same socially and economically disadvantaged individual(s)
43 which has annual average gross receipts in excess of \$16,600,000 over the
44 business's previous three fiscal years.

45
46 *Socially and economically disadvantaged individuals* means those individuals
47 who are citizens of the United States (or lawfully admitted permanent
48 residents) and who are women, Black Americans, Hispanic Americans,
49 Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and
50 any other minorities or individuals found to be disadvantaged by the Small
51 Business Administration pursuant to section 8(a) of the Small Business Act.

The Contracting Agency shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. The Contracting Agency also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

- (a) *Black Americans*, which includes persons having origins in any of the Black racial groups of Africa;
- (b) *Hispanic Americans*, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (c) *Native Americans*, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (d) *Asian-Pacific Americans*, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and
- (e) *Asian-Indian Americans*, which includes persons whose origins are from India, Pakistan, and Bangladesh.

Women shall be presumed to be socially and economically disadvantaged individuals.

DBE Eligibility

Disadvantaged Business Enterprises proposed by the bidder to be used on this project shall be shown as a DBE for federal purposes on the current list of firms accepted as certified by the Office of Minority and Women's Business Enterprises (OMWBE) or who can produce written proof from OMWBE showing they were accepted as certified as such prior to the date fixed for opening bids. Such certifications are made pursuant to authority granted by, chapter 39.19 RCW, title 326 WAC, 49 CFR, or any other applicable laws.

A consolidated list of firms accepted as certified by OMWBE is available at nominal cost from that office.

In addition to firms accepted as certified by OMWBE and appearing on the above referenced list, the Contracting Agency will accept any firm determined by the Federal Small Business Administration to be owned and controlled by socially and economically disadvantaged individuals under section 8(a) of the Small Business Act, 13 CFR part 121, provided that OMWBE must have received a completed OMWBE DBE application form from such firms together with written proof of a current SBA 8(a) certification prior to the date fixed for opening bids and further provided that such firms do not exceed the size limits as contained herein under Definitions.

Firms not meeting the above requirements at the time fixed for the opening of bids will not be accepted by the Contracting Agency for the purpose of meeting the goals as stated below.

In the event the apparent low bidder proposes to use a firm that is certified at the time of the submission of the bid, and that firm is determined to be ineligible prior to execution of the contract, the apparent low bidder will be required to substitute another certified firm to meet the goal, at no additional cost to the Contracting Agency.

If, at the time of bid opening, a certified business is projected to perform work classified in a standard industrial classification (SIC) code not listed for the business in either the directory of certified businesses published by OMWBE, or the records of that office, the Contracting Agency's determination, prior to award, that the business will perform a commercially useful function shall prevail over the listed SIC code(s) in determining whether the DBE participation goals established for the contract are met. The presence or absence of SIC codes shall not be a basis for protest of an award.

Firms with only MBE or WBE certification are ineligible for goal attainment and utilization of such firms for goal attainment will be rejected and may result in the bidder's proposal being declared non-responsive.

Joint Venture Approval

Under authority of 49 CFR, money spent on contracts awarded to joint ventures can be counted toward goal attainment when the procedure outlined in this specification is followed.

- a. Contents of joint venture agreement. The joint venture agreement must be in writing and signed under penalty of perjury by all of the joint venturers. Each joint venture agreement shall specify the contribution made by each joint venturer; the control each will exercise; the potential for profit or loss and the distribution thereof. Each of these elements must be allocated in proportion to their contribution. The joint venture agreement must also identify the commercially useful function the joint venture will perform and the part of the work each joint venturer will do. The agreement must also specify which participant(s) are DBEs and give documentations of DBE certification.
- b. Requests for approval. Any joint venture may request approval by the Contracting Agency. The request must be in writing, must include a written joint venture agreement and must contain a statement that gives the Contracting Agency authority to audit the joint venture. A prospective bidder will not be given a bid proposal unless the bidder has submitted the joint venture agreement at least seven calendar days before the date of opening bids for a specified project. The agreement shall conform to the requirements of subsection (a) of this section. The Contracting Agency will approve a joint venture which submits an agreement that contains each of these specified elements.

- 1 c. Time of request. A request for approval of a joint venture must be
2 submitted and approved before the time fixed for bid opening.
3
4 d. Effect of approval. A joint venture is approved for only one specific
5 contract.
6
7 e. Investigation. The Contracting Agency may request additional
8 information from an enterprise seeking approval as a joint venture.
9 Failure to provide the requested information may result in the denial of
10 the request for approval.
11
12 f. Complaints. Complaints regarding the opposition of validity of an
13 approved joint venture shall be written and shall be made to the
14 Contracting Agency. The Contracting Agency shall fully investigate
15 each complaint and issue a written report of its findings. The report will
16 be provided to the complainant and to the joint venture.
17

18 **DBE Goals**

19 In order to comply with the requirements of 49 CFR Part 23, the Contracting
20 Agency has established a goal in the amount of:

21 *** \$\$1\$\$ ***
22
23

24 The Contracting Agency expects that the bidder shall make every effort,
25 through negotiations and/or written solicitations with the DBE firms, to meet
26 the above specified goal.
27

28 **DBE Utilization Certification**

29 The bidder shall submit with the bid, a Disadvantaged Business Enterprise
30 Utilization Certification which has been made a part of the proposal. This
31 certification shall be used to determine whether the bid is responsive to the
32 DBE requirements in the invitation to bid and whether a bidder has complied
33 with the DBE goal. The Contracting Agency shall consider as non-
34 responsive those bids submitted which do not contain the certification, which
35 contain false certification, or which display insufficient projected use of DBEs.
36

37 **Counting DBE Participation Toward Meeting The Goal**

38 DBE participation shall be counted toward meeting the project goal in
39 accordance with the following criteria:
40

- 41 a. Except as specified below, the total dollar value of the contract
42 awarded to the DBE is counted toward the DBE goal.
43
44 b. A portion of the total dollar value of a contract with an eligible joint
45 venture equal to the percentage of the ownership and control of the
46 DBE partner in the joint venture will be counted toward the DBE
47 goal.
48
49 c. As described below, expenditures for materials and supplies
50 obtained from approved DBE manufacturers and regular dealers are
51 counted toward the DBE goal, provided that the DBE assumes the

1 actual and contractual responsibility for the provision of the
2 materials and supplies.
3

- 4 (1) Manufacturers. A Contractor may count toward its DBE goal
5 100 percent of its expenditures for materials and supplies
6 required under a contract and obtained from a DBE
7 manufacturer only if the Contracting Agency approves the
8 description of the DBE's responsibilities for manufacturing the
9 supplies in advance of the bid opening. To obtain the
10 Contracting Agency approval, the bidder or manufacturing firm
11 must submit a written request which must be received by the
12 Contracting Agency no later than ten days prior to bid opening
13 describing the manufacturing process the DBE will perform.
14 Once a firm's manufacturing process has been approved in
15 writing it is not necessary to resubmit the firm for approval
16 unless the manufacturing process has substantially changed. If
17 the Contracting Agency approval of the manufacturing process
18 is not obtained prior to the time fixed for opening bids, the
19 expenditure to the proposed DBE manufacturer cannot be
20 counted. Counting of the DBE amount may be allowed as a
21 regular dealer or as a service provider where the requirements
22 as described below are met.
23

24 For purposes of this section, a manufacturer is a firm that
25 operates or maintains a factory or establishment that produces
26 on the premises the materials or supplies obtained by the
27 Contractor.
28

- 29 (2) Regular Dealers. A Contractor may count toward its DBE goal
30 60 percent of its expenditures for materials and supplies
31 required under a contract and obtained from a DBE regular
32 dealer only if the Contracting Agency approves the DBE
33 regular dealer in advance of bid opening. To obtain approval,
34 the bidder or regular dealer must submit a written request
35 which must be received by the Contracting Agency no later
36 than ten days prior to bid opening describing the regular
37 dealer's responsibilities. Once a firm's regular dealer status
38 has been approved in writing it is not necessary to resubmit the
39 firm for approval unless the operating procedures have
40 substantially changed. If the Contracting Agency approval of
41 the regular dealer's status is not obtained prior to the time fixed
42 for opening bids, the expenditure to the DBE regular dealer
43 cannot be counted at 60 percent. Partial counting of the DBE
44 amount may be allowed as a service provider as described
45 below.
46

47 For purposes of this section, a regular dealer is a firm that
48 owns, operates, or maintains a store, warehouse, or other
49 establishment in which materials or supplies required for the
50 performance of the contract are bought, kept in stock, and
51 regularly sold to the public in the usual course of business. To

1 be a regular dealer, the firm must engage in, as its principal
2 business and in its own name, the purchase and sale of the
3 products in question. A regular dealer in such items as steel,
4 cement, gravel, stone, and petroleum products need not keep
5 such products in stock if it owns or operates distribution
6 equipment. Brokers and packagers shall not be regarded as
7 regular dealers within the meaning of this section.
8

9 d. Service Providers: A Contractor may count toward its DBE goal the
10 following expenditures to DBE firms:
11

12 (1) The fees or commissions charged for providing a BONA
13 FIDE service, such as professional, technical, consultant,
14 or managerial services and assistance in the procurement
15 of essential personnel, facilities, equipment, materials, or
16 supplies required for performance of the contract, provided
17 that the fee or commission is determined by the
18 Contracting Agency to be reasonable and not excessive as
19 compared with fees customarily allowed for similar
20 services.
21

22 (2) The fees charged for delivery of materials and supplies
23 required on a job site (but not the cost of the materials and
24 supplies themselves) when the hauler, trucker, or delivery
25 service is not also the manufacturer of or a regular dealer
26 in the materials and supplies, provided that the fee is
27 determined by the Contracting Agency to be reasonable
28 and not excessive as compared with fees customarily
29 allowed for similar services.
30

31 (3) The fees or commissions charged for providing any bonds
32 or insurance specifically required for the performance of
33 the contract, provided that the fee or commission is
34 determined by the Contracting Agency to be reasonable
35 and not excessive as compared with fees customarily
36 allowed for similar services.
37

38 If any of the aforementioned manufacturer or supply services are
39 commercially unnecessary, such as the case when a firm acts only as a
40 passive conduit in the supply process or duplicates a service provided by
41 others in the same chain of supply from manufacturer to purchaser, no credit
42 will be granted toward the DBE goal.
43

44 The Contracting Agency reserves the right to conduct reviews, prior to award,
45 of the apparent low bidder's projected use of DBE participation.
46

47 **Selection of Successful Bidder**

48 The successful bidder shall be selected on the basis of having submitted the
49 lowest responsive bid which has met the DBE goal as established elsewhere
50 in these contract documents. Should the low and otherwise responsive
51 bidder fail to attain the goal, responsiveness shall be determined on the basis

of good faith efforts taken to attain the goal. The Contracting Agency has established the following objective measurement of good faith.

Good faith shall be determined in light of the DBE participation attained by all bidders and by comparing the DBE participation to the average DBE participation by all bidders. For purposes of computing the average DBE participation, only that amount of the DBE goal attainment which does not exceed the established goal shall be used. Should the low bidder's DBE participation be lower than the average, the bid shall be considered non-responsive and shall be rejected. If the lowest bid is rejected, the next lowest bid, or bids, shall be examined under the foregoing criteria until the contract is awarded or all bids rejected.

DBE Contract Compliance

The Contracting Agency will notify the successful bidder of the award of the contract in writing and include a request for a further breakdown of the DBE information.

After award and prior to execution of the contract, the Contractor shall provide in writing to the Contracting Agency information describing the work to be performed by each DBE, and the total price for each item to be paid to each DBE on this project. The total price for all items to be paid to each DBE shall not be less than the dollar amounts listed on the DBE utilization certification for each DBE. This information shall be included in the executed contract. Failure to provide information meeting the DBE requirements shall be reason to cause forfeiture of the proposal bond or deposit of this bidder.

Only expenditures to DBEs that perform a commercially useful function in the work of a contract will be counted toward the DBE goal. A DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a DBE is performing a commercially useful function, the Contracting Agency may evaluate the amount of work subcontracted, industry practices, and other relevant factors.

To ensure all obligations under contracts awarded to DBEs are met, the Contracting Agency shall review the Contractor's DBE involvement efforts during the performance of the contract. The Contractor shall bring to the attention of the Contracting Agency any situation in which regularly scheduled progress payments are not made to DBE subcontractors.

In the event the Contracting Agency elects to delete the items of work described in the Special Provision **AWARD AND EXECUTION OF CONTRACT**, the DBE goals shall then apply to the Contractor's amount less the amount bid for the deleted work. If the otherwise responsive low bidder has identified some or all of the deleted work as DBE work and the remaining work does not include sufficient DBE work to meet the goals, other work of such value needed to meet the aforementioned goal(s) shall be substituted by the Contractor to the same DBE or substitute another certified DBE to perform equivalent value work.

1
2 If DBE work is diminished or deleted by change order(s) other than that
3 contemplated in the Special Provision **AWARD AND EXECUTION OF**
4 **CONTRACT**, then other work of equivalent value shall be substituted by the
5 Contractor to the same DBE or substitute another certified DBE to perform
6 equivalent value work or provide good faith effort documentation.
7

8 After execution and throughout the life of the contract, where DBE work is
9 diminished or deleted by a Contractor proposed change order, or where the
10 DBE becomes ineligible or is unable or unwilling to perform, other work of
11 equivalent value shall be substituted by the Contractor. Substitution shall be
12 to the same DBE, or to another certified DBE to perform equivalent value
13 work, at no additional cost to the Contracting Agency. Documentation of the
14 Contractor's "good faith efforts" to provide a substitution may be accepted in
15 lieu of an actual substitution of another firm.
16

17 In the event the DBE expects to share the resources of the prime contractor
18 in the form of facilities, financial assistance, equipment or personnel, a
19 written plan describing the facilities, financial assistance, equipment or
20 personnel to be shared shall be submitted by the Contractor to the Engineer
21 for approval by the WSDOT External Civil Rights Branch before the DBE
22 commences work to ensure that no violation to the performance of the
23 commercially useful function occurs. If the DBE is sharing resources with
24 other than the prime contractor, the above information shall be provided as
25 requested by the Engineer.
26

27 This information will be used by the WSDOT External Civil Rights Branch to
28 determine compliance with the commercially useful function requirements.
29

30 **Penalties for Noncompliance**

31 In accordance with WAC 468-16-180, the Contracting Agency may suspend
32 the qualification of the Contractor for up to six months for the continual failure
33 to comply with DBE requirements.
34

35 In accordance with WAC 468-16-190, the Contracting Agency may revoke
36 the qualification of the Contractor for up to two years if the Contractor has
37 been suspended two or more times within a two-year period.
38

39 If the Contracting Agency contemplates suspension or revocation of the
40 Contractor's qualifications, the Contractor may request, in writing, that a
41 hearing be held as provided under WAC 468-16-200.
42

43 If a person, firm, corporation, or business does not comply with any provision
44 of this contract required under Chapter 39.19 RCW, the Contracting Agency
45 may withhold payment, debar the Contractor, suspend or terminate the
46 contract, and subject the Contractor to civil penalties of up to ten percent of
47 the amount of the contract for each violation. Willful repeated violations,
48 exceeding a single violation, may disqualify the Contractor from further
49 participation in state contracts for a period of up to three years. When the
50 Contractor has been notified that it is to be assessed a penalty, the

1 Contractor may request, in writing, that a hearing be held as provided under
2 WAC 326-08-015.
3
4 **Further Information**
5 If further information is desired concerning Disadvantaged Business
6 Enterprise participation, inquiry may be directed to:
7
8 External Civil Rights Branch
9 Office of Equal Opportunity
10 Washington State Department of Transportation
11 Transportation Bldg., P.O. Box 47314
12 Olympia, WA 98504-7314
13 or telephone - (360) 705-7085.
14 Fax (360) 705-6801